No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, et al.,
Petitioners,

v.

STATE OF NEW YORK, et al.,
Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR GOVERNMENT RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the district court correctly concluded, on the basis of well-settled principles of administrative law, that the Secretary of Commerce's decision to add a citizenship question to the 2020 decennial census questionnaire was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

2. Whether petitioners' challenges to the district court's authorization of limited discovery beyond the agency's proffered administrative record are moot and, in any event, meritless given that extraordinary circumstances raised significant doubts about whether the agency had provided the whole record or an accurate account of its decision-making.

3. Whether the Secretary of Commerce's decision to add a citizenship question to the 2020 decennial census questionnaire violated the Enumeration Clause of the U.S. Constitution, art. I, § 2, cl. 3.

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INTRODUCTION

The Constitution and the Census Act require the federal government to count every person in this country every ten years. This enumeration has momentous consequences: it determines the allocation of congressional seats, state and local apportionment, and the distribution of billions of dollars in federal funds. And there is just one chance each decade to get the enumeration right.

To ensure that this extraordinarily complex process serves its important purposes, the Department of Commerce and the Census Bureau have developed rigorous, scientifically tested standards to achieve an accurate and complete count. In applying those standards for the last seventy years, Commerce and the Bureau have emphatically declined to ask a citizenship question of every household. As the Bureau has long recognized, a citizenship question would exacerbate the undercount of noncitizen and Hispanic households, rendering the enumeration inaccurate in some States more than others, and undermining its constitutional and statutory purposes.

Secretary of Commerce Wilbur Ross disregarded this longstanding bipartisan and scientific consensus and ordered that a citizenship question be added to the 2020 questionnaire. In doing so, the Secretary rejected uncontroverted evidence showing that the citizenship question would reduce response rates among noncitizen and Hispanic households and thus harm the enumeration's distributive accuracy. He also sidestepped the Bureau's well-established procedures for testing changes to the questionnaire to avoid undercounts. And while the Secretary purported to rely on a Department of Justice (DOJ) request for

better citizenship information for Voting Rights Act (VRA) enforcement, he ignored the unanimous evidence before him showing that more accurate citizenship information could be provided at lower cost without asking a citizenship question, and failed to disclose the active role that he and his staff had played in soliciting and then generating DOJ's supposedly independent request.

The United States District Court for the Southern District of New York (Furman, J.) made detailed factual findings that adding a citizenship question would affirmatively undermine the accuracy of the decennial census (among other harms) for no demonstrable benefit. The court correctly held that the Secretary's decision violated the Administrative Procedure Act (APA) because it was arbitrary and capricious, it was contrary to two provisions of the Census Act, and the rationale provided by the Secretary was pretextual. For similar reasons, the Secretary's decision violated the Enumeration Clause.

For each of these reasons, the judgment below should be affirmed.

STATEMENT

A. Modernization of the Decennial Census

1. The Constitution requires an "actual Enumeration" of the population every ten years. Art. I, § 2, cl. 3; amend. XIV, § 2. This enumeration must count all residents, regardless of citizenship. *See Federation for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court). The enumeration affects the apportionment of representatives to Congress among the States; the

allocation of electors to the Electoral College; the division of congressional, state, and local legislative districts within each State; and the distribution of hundreds of billions of dollars of federal funds. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-29 (2016). Congress has delegated the conduct of the decennial enumeration to the Secretary of Commerce, whose decisions are constrained by both statutory restrictions and the constitutional requirement that the census bear a "reasonable relationship to the accomplishment of an actual enumeration of the population." *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996); *see* Pub. L. No. 105-119, § 209(a)(6), 111 Stat. 2440, 2481 (1997).

2. Before 1960, the decennial census was a sprawling endeavor with two different and often conflicting goals: counting the total population, and collecting other demographic information. The census questionnaire grew to include hundreds of questions covering such disparate topics as occupations, literacy, and health. *See* Carroll Wright & William Hunt, *The History and Growth of the United States Census* 166 (1900) (S. Doc. No. 194), https://tinyurl.com/y3ouuthc. The complexity of the questionnaire, administered by in-person enumerators who interviewed respondents and often misunderstood questions or answers, harmed the accuracy of both the enumeration and demographic data. Margo Anderson & Stephen Fienberg, *Who Counts?* 19-23 (2001); Margo Anderson, *The American Census* 206-07 (2d ed. 2015).

During this time, the census sometimes, but not always, requested citizenship information. Before

1960, seven of the fifteen decennial censuses did not seek citizenship status.[1]

3. In 1960, the decennial census changed dramatically into its modern form. Growing sophistication of data collection, statistical science, and testing procedures had by then allowed Commerce and the Bureau to understand that the census suffered from serious data-accuracy problems, and to develop ways to address those problems.

Increasingly robust evaluation procedures demonstrated that the census undercounted the population, and that this undercount was not spread evenly across demographic groups or geographic areas. Anderson, *supra*, at 215-20; Anderson & Fienberg, *supra*, at 29-30. Evaluations of the 1950 census, for example, demonstrated that the census had undercounted racial minorities at substantially higher rates than others. Anderson & Fienberg, *supra*, at 30.

Moreover, new data-collection techniques could provide information as accurate as, and sometimes more accurate than, demographic data collected via the decennial census, while lowering costs and lessening the burden on individual responders. Miriam Rosenthal, *Striving for Perfection: A Brief History of Advances and Undercounts in the U.S. Census*, 17 Gov't Info. Q. 193, 199-200 (2000). Government records containing demographic information ("administrative records") had grown in number and

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[1] No citizenship inquiry appeared in 1790-1810, 1840-1860, and 1880. Although some of these censuses asked about birthplace, that question does not provide citizenship status. Wright & Hunt, *supra*, at 132, 142-43, 147, 154, 166.

scope with the creation of agencies like the Social Security Administration and the Immigration and Naturalization Service. Anderson, *supra*, at 186-90. And sampling—a technique that extrapolates information about the entire population from data about a representative subset—proved capable of producing highly accurate demographic data without harming the enumeration. *Id.* at 206; *Plans for Taking the 1960 Census: Hr'g Before the House Subcomm. on Census & Government Statistics* ("*1960 Plans*") 5-6 (1959).

Given these developments, the 1960 census was dramatically changed to address the differential undercount and to reduce burdens and costs. For the first time, rather than relying on enumerators to visit each household, the Bureau sent the questionnaire by mail. *See 1960 Plans*, *supra*, at 6-7. Moreover, the questionnaire sent to most households (the "short form") was reduced to a few simple, noncontroversial questions, such as the number of individuals in each household and their race, gender, and marital status. All other demographic questions, including those about citizenship, were removed and placed on a "long form" questionnaire, initially sent to one of every four households, and later to one of six households. (Pet. App. 18a; *see* J.A.1211-1253 (2000 short- and long-form questionnaires).)

The 1950 census was thus the last time the census asked every household about citizenship. (Pet. App. 27a.) Ever since, Commerce and the Bureau have vigorously opposed adding a citizenship question to the questionnaire sent to every household, because doing so will "inevitably jeopardize the overall accuracy of the population count" by depressing responses from certain populations and contributing to a differential undercount. (Pet. App. 28a (quotation marks omitted).)

After the 2000 census, the long-form questionnaire was replaced by the American Community Survey (ACS), a yearly survey conducted separately from the decennial census, and distributed to about one of every thirty-six households. (Pet. App. 18a-19a.)

4. Congress substantially reformed the Census Act in 1976 to further modernize the census. Pub. L. No. 94-521, 90 Stat. 2459 (1976). These reforms permitted Commerce to collect demographic information, but placed important constraints on the use of the decennial census questionnaire for that purpose and prioritized other means of collecting such information.

To collect more up-to-date demographic information than the decennial census provides, Congress authorized the Secretary to conduct a mid-decade census "in such form and content as he may determine, including the use of sampling procedures and special surveys." § 7, 90 Stat. at 2461 (13 U.S.C. § 141(d)). Congress used the same quoted language in the separate provision authorizing the Secretary to conduct the decennial census. *Id.* (13 U.S.C. § 141(a)). This delegation of authority was "essentially the same" as "existing law," H.R. Rep. 94-1719, at 11 (1976) (Conf.), except that Congress added language to "encourage the use of sampling," S. Rep. 94-1256, at 4 (1976). The amendments also provided that the Secretary may use the decennial census to collect "other" information besides a "census of population," but only "as necessary." § 7, 90 Stat. at 2461 (13 U.S.C. § 141(a)).

Congress also expressly limited the Secretary's ability to use the decennial census to collect demographic information (aside from total population), and directed him to use more accurate and less costly

statistical techniques instead. First, in 13 U.S.C. § 6(c), Congress required the Secretary to use administrative records instead of census questions to collect demographic data "[t]o the maximum extent possible" given "the kind, timeliness, quality and scope of the statistics required." § 5, 90 Stat. at 2460. Second, where "feasible," the Secretary must use sampling instead of census questions to obtain demographic information beyond the enumeration. § 10, 90 Stat. at 2464 (13 U.S.C. § 195). By prioritizing other means of collecting demographic information, Congress intended to minimize the census's burden on responding individuals and thus maximize census responses. H.R. Rep. 94-1719, at 10; S. Rep. 94-1256, at 1, 5.

5. Since at least 1940, the decennial census has undergone extensive pretesting before census day. Daniel Cork, *Census Testing, in Encyclopedia of the U.S. Census* 79, 79 (Margo Anderson et al. eds., 2d ed. 2012). Such testing reflects not only the important consequences of the census, but also the fact that the decennial census is conducted only once every ten years, with little room for correction if problems arise. Pretesting is now a multi-year endeavor that subjects nearly every aspect of the census to a battery of evaluations, culminating in a comprehensive "dress rehearsal" to understand how all aspects of the census work together. *Id.* at 79-81. (J.A.1296.) A critical part of that process is pretesting individual questions to ensure that they yield accurate data without reducing census responses. Pretesting includes administering the questions to a sample of respondents to verify that they "[c]an be understood," "[a]re not unduly sensitive," and "do not cause undue burden." (J.A.627-628.)

Overlapping statutes, guidelines, and agency practices govern testing. For example, the Office of

Management and Budget's (OMB) data-quality standards direct Commerce to design the census "to achieve the highest practical rates of response," and thus require pretesting of census questions. (J.A.657.) *See* 44 U.S.C. §§ 3501(1)-(2), 3506(e). The Bureau's Statistical Quality Standards likewise require that the census "be pretested with respondents to identify problems" before implementation. (J.A.626.) When an already-pretested survey undergoes "substantive modifications," including the addition of a new question, "[p]retesting must be performed" again. (J.A.627.)

Commerce has consistently refused to add questions to the decennial census that performed poorly in pretesting. For the 1980 census, Commerce declined to replace a question about Spanish origin with a question about ethnicity after testing showed that misunderstandings about the question resulted in high nonresponse rates. Census Bureau, *1980 Census of Population and Housing Part A: History* 2-20 (1986), https://tinyurl.com/yy7ahzyr. For the 2000 census, Commerce declined to add a question requesting Social Security numbers after pretesting revealed a disproportionately distributed "3.4% decline in self-response rates attributable to the question." (Pet. App. 30a; *see* J.A.892-893.) *See* 1 Census Bureau, *2000 Census of Population and Housing: History* 46 (2009), https://tinyurl.com/yxqz6hkq.

B. The Decision to Add a Citizenship Question

In a memorandum dated March 26, 2018, the Secretary announced his decision to add a citizenship question to the 2020 census questionnaire sent to every household. (Pet. App. 548a-563a.)

1. The Secretary represented that he began assessing whether to add a citizenship question "[f]ollowing receipt" of a December 2017 letter from DOJ requesting block-level citizenship data to help enforce § 2 of the VRA. (Pet. App. 548a-549a.) But as the Secretary later acknowledged in a June 2018 supplemental decision memorandum, DOJ's letter had not initiated his decision-making. Rather, the Secretary had begun his "deliberative process" soon after his appointment in February 2017—almost a year before DOJ's letter. (Pet. App. 546a.) And DOJ had not submitted the December 2017 letter on its own initiative; rather, the Secretary and his staff had approached DOJ to urge them to request a citizenship question. (Pet. App. 82a-84a.)

The supplemental memorandum also failed to fully disclose the Secretary's engagement with the issue before December 2017. (Pet. App. 74a-99a, 118a-129a.) The Secretary actually "made the decision months *before* DOJ sent its letter." (Pet. App. 118a.) The Secretary and his staff then "actively lobbied other agencies" to request a citizenship question, including both DOJ and the Department of Homeland Security (DHS). (Pet. App. 121a.) After both agencies declined (Pet App. 82a-84a), the Secretary reached out to then–Attorney General Sessions, who discussed the issue with John Gore, then the Acting Assistant Attorney General for Civil Rights. (Pet. App. 89a-90a.) The Attorney General's senior counselor reassured the Secretary's Chief of Staff that DOJ would "do whatever you all need us to do." (J.A.254.) Gore then wrote DOJ's December 2017 letter, signed by another DOJ official, requesting the addition of a citizenship question to the decennial questionnaire to provide DOJ

with block-level citizenship data for VRA enforcement. (Pet. App. 91a-95a, 564a-569a.)

2. In December 2017 and January 2018, in response to DOJ's letter, Dr. John Abowd—the Bureau's Chief Scientist—and his team of experts analyzed the effects of adding a citizenship question to the decennial questionnaire in a series of memoranda. (J.A.104-122, 290-295, 301-318.) The Bureau conducted this analysis without any awareness of the Secretary's involvement in generating DOJ's letter (Pet. App. 116a-117a).

The memoranda warned the Secretary that adding the question would not only depress the initial response rate for *all* households, but would also depress the response rate of households with a noncitizen by *at least* 5.1 percentage points more than for citizen households—approximately 1.6 million more people not responding. (J.A.114-115 (630,000 households); J.A.1008 n.58 (2.54 persons per household).) The memoranda explained that because this estimate was "cautious," the actual differential reduction in self-response rates would likely be much greater. (J.A.114-116.) (The Bureau later updated its analysis to warn that the differential decline in response rates would be at least 5.8 percentage points—approximately 6.5 million people (J.A. 1008).[2]) While the Bureau attempts to address initial nonresponses through Nonresponse Followup (NRFU)

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[2] This updated conclusion reflected both the increase from 5.1% to 5.8% and updated figures on the number of noncitizen households and the average number of people per household. (J.A.1008 & n.58.)

procedures,[3] the memoranda warned that NRFU would be "very costly" (J.A.105, 115) and would not resolve the problems introduced by the lower response rate (J.A.113-116).

By contrast, the Bureau explained that it could use existing administrative records to produce block-level citizenship data as accurate as the block-level race, age, and ethnicity data DOJ already uses for VRA purposes. (J.A.105-107, 290-292, 317-318.) The Bureau would use the "Numident," a database containing "information on every person" with a Social Security or Individual Taxpayer Identification Number. (J.A.117.) This database contains highly reliable citizenship information because individuals must provide proof of citizenship or immigration status to obtain these numbers. (J.A.117.) The Bureau would then "link" individual census responses to these database records by matching personal identifying information. (J.A.156, 158, 954.) The Bureau could already link roughly 90% of census respondents to Numident records, and planned to obtain additional records from other agencies to increase the number of successful linkages. (J.A.120-121, 133-135, 154-155.) The Bureau could then integrate this citizenship data with the other block-level census data (known as "PL94-171 data") that the Secretary produces and makes publicly available after every decennial census for redistricting and that DOJ already uses for VRA enforcement. (J.A.105-107, 290-292, 317-318, 860,

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[3] NRFU includes visits by enumerators; "use of administrative records; collection of information from 'proxies,' such as neighbors or landlords; and 'imputation,' a process through which the Census Bureau extrapolates data about households" from comparable household data. (Pet. App. 151a.)

906-908.) *See* Pub. L. No. 94-171, 89 Stat. 1023 (1975) (13 U.S.C. § 141(c)).

Because a citizenship question would generate "substantially less accurate" citizenship data than administrative records and would also impair the enumeration, the Bureau recommended using administrative records to provide block-level citizenship data to DOJ. (J.A.105.) The Bureau's Acting Director informed DOJ that this approach would provide "higher quality [citizenship] data produced at lower cost" than adding a citizenship question. (J.A.265.) Although the Bureau sought to meet with DOJ to discuss this recommendation, the Attorney General directed DOJ to decline such a meeting. (Pet. App. 95a-97a; J.A.266.)

Meanwhile, the Secretary directed the Bureau to analyze the effects of using *both* a citizenship question *and* administrative records to generate citizenship data. (Pet. App. 51a-58a.) In a memorandum dated March 1, 2018, Dr. Abowd and his team provided the Secretary with an analysis concluding that this hybrid approach would "have all the negative cost and quality implications" of adding the citizenship question—including a decrease in self-response rates—while "result[ing] in poorer quality citizenship data than" using administrative records alone. (J.A.158-159.)

3. The Secretary then issued his March 26, 2018, decision memorandum announcing that he would both add a citizenship question to the decennial questionnaire and use administrative records. (Pet. App. 548a-563a.) The memorandum asserted that "limited empirical evidence exists about whether adding a citizenship question would decrease response rates" (Pet. App. 557a), disregarding the multiple empirical analyses demonstrating that adding the question would disproportionately decrease response rates and harm the enumeration's accuracy. The memorandum also stated that the advantage of the Secretary's approach was that it would provide DOJ the "most complete and accurate" citizenship data (Pet. App. 556a), contrary to evidence that this approach would provide *less* complete and *less* accurate citizenship data than using administrative records alone. The Secretary further claimed that the citizenship question was sufficiently "well tested" (Pet. App. 550a), even though the question had not undergone any of the testing that governs the census questionnaire.

C. Procedural History

1. New York, seventeen other States, sixteen local governments, and the U.S. Conference of Mayors ("government respondents") filed a complaint alleging that the Secretary's decision to add a citizenship question violated the APA and the Enumeration Clause.

2. Petitioners' initial Administrative Record contained scarcely any documents preceding DOJ's December 2017 letter, despite the Secretary's acknowledgment in his supplemental decision memorandum that he had been deliberating the citizenship question during that time. (Pet. App. 546a.) On July 3, 2018, the district court ordered petitioners to complete the Administrative Record, authorized limited expert discovery, and authorized additional discovery based on the irregularity of petitioners' initial record and on a strong showing of petitioners' bad faith and improper behavior. (Pet. App. 523a-531a.) On August 17, the district court authorized a deposition of Gore (Pet. App. 452a-455a), and on September 21 authorized a deposition of the Secretary (Pet. App. 437a-439a).

This Court stayed the Secretary's deposition but declined to stay Gore's deposition or other discovery. 139 S. Ct. 16 (2018). The Court then granted certiorari to review the pretrial discovery orders, 139 S. Ct. 566 (2018) (No. 18-557), but declined to stay the trial, 139 S. Ct. 452 (2018).

3. Meanwhile, the district court denied petitioners' motion to dismiss the APA claims, concluding that the Secretary's decision to add a citizenship question to the decennial census was reviewable. (Pet. App. 21a-25a, 402a-408.)

The court did, however, dismiss respondents' Enumeration Clause claim for failure to state a claim. (Pet. App. 408a-424a.) While the court recognized that the Enumeration Clause reflects "a strong constitutional interest in accuracy" (Pet. App. 423a (quoting *Utah v. Evans*, 536 U.S. 452, 478 (2002))), it held that the existence of a citizenship inquiry before 1960 precluded the argument that such a question was

altogether forbidden by the Constitution (Pet. App. 412a).

4. After an eight-day trial, the district court issued an opinion containing detailed findings of fact and conclusions of law. (Pet. App. 1a-353a.) The court entered final judgment vacating the Secretary's decision, enjoining the addition of a citizenship question to the 2020 census unless the legal defects identified by the court were cured, and remanding to Commerce. (Pet. App. 352a.)

First, the court evaluated what evidence it could properly consider. As the parties had agreed, the court considered the Administrative Record for any purpose (Pet. App. 250a) and extra-record evidence to determine respondents' standing (Pet. App. 129a-130a). The court did not consider extra-record evidence to resolve whether petitioners had violated the APA, except where such material illuminated technical matters or showed a failure to consider important factors. (Pet. App. 260a-261a.) The court further determined that, while it could permissibly consider extra-record material to decide whether the Secretary's decision was pretextual, it did not need to do so because it "would reach the same conclusions" based solely on the Administrative Record. (Pet. App. 261a.)

Second, the court determined that respondents had standing. (Pet. App. 130a-239a.)

Third, the court ruled that the Secretary's decision violated the APA in multiple independent ways. The decision was arbitrary and capricious, and based on a pretextual rationale. The decision was also contrary to law because it violated two statutes: one requiring the Secretary, "[t]o the maximum extent possible," to

acquire demographic information using administrative records rather than direct inquiries, 13 U.S.C. § 6(c); and another precluding the Secretary from altering previously reported census topics without making certain findings and filing a new report with Congress, *id.* § 141(f). (Pet. App. 261a-321a.) The court noted that extra-record evidence confirmed, but was not essential to, its conclusions on the APA claims. (Pet. App. 313a-315a, 320a-321a.)

Fourth, the court rejected the Fifth Amendment equal protection claim brought by private respondents in a consolidated case. (Pet. App. 322a.)

Finally, the court vacated as moot its order authorizing the Secretary's deposition. (Pet. App. 352a-353a.)

5. In No. 18-557, the parties submitted opening briefs in this Court addressing the pretrial discovery issues. After the district court entered final judgment, respondents moved to dismiss the writ as improvidently granted. The Court removed No. 18-557 from its argument calendar and suspended further briefing. The Court then granted certiorari before judgment in this case.

6. In a separate proceeding brought by different plaintiffs to challenge the addition of a citizenship question, the United States District Court for the Northern District of California (Seeborg, J.), on March 6, 2019, issued a post-trial decision holding that the Secretary's decision violated both the APA and the Enumeration Clause. *California v. Ross*, No. 18-cv-1865, 2019 WL 1052434 (N.D. Cal. 2019). This Court directed the parties here to brief and argue, as an alternative ground for affirmance, whether the Secretary's decision violated the Enumeration Clause.

SUMMARY OF ARGUMENT

I. Government respondents have standing. Petitioners' opening brief does not dispute the district court's extensive findings about injury and redressability. Instead, petitioners argue only that respondents' injuries are not traceable to the Secretary's decision to add a citizenship question because they are more proximately caused by the unlawful and irrational failure of third parties to respond to the census questionnaire. But this Court has long held that the intervening acts of third parties do not break the causal chain if those acts predictably result from challenged conduct. Here, the district court made factual findings—uncontested by petitioners—that the citizenship question will cause differential nonresponse rates for noncitizens and Hispanics, leading to a differential undercount and a decrease in data quality that will concretely injure respondents. Given this proof that third parties *will* react in ways that harm government respondents, it is immaterial whether their reactions are unlawful or irrational.

II. The Secretary's decision to add a citizenship question violates the APA.

A. The Secretary's decision is reviewable. Petitioners misread § 141(a) of the Census Act, 13 U.S.C. § 141(a), as conferring unreviewable discretion on the Secretary to place whatever questions he wants on the decennial questionnaire. This Court has repeatedly reviewed the Secretary's actions under this provision. And petitioners' argument is inconsistent with the 1976 Census Act, which is the source of the language that petitioners rely on here. That enactment included multiple provisions that constrained the Secretary's conduct of the census and provide judicially

manageable standards here, including the requirement that the Secretary rely, to the "maximum extent possible," on administrative records rather than census questions to collect demographic information, 13 U.S.C. § 6(c).

B. The Secretary's decision was arbitrary and capricious.

First, the Secretary unreasonably ignored the uncontroverted empirical evidence that the citizenship question would make the enumeration less accurate. All the evidence in the Administrative Record demonstrates that a citizenship question would cause millions of noncitizens and Hispanics to not respond to the census, undermining the accuracy of the constitutionally required headcount.

The Secretary was not entitled to dismiss this evidence as "inconclusive." That label is contradicted by the firm conclusions of the analyses themselves. More fundamentally, even if the evidence of an undercount were inconclusive, the Secretary's actions would still be unreasonable because he abandoned the well-established process for testing proposed changes to the questionnaire. The testing process ensures that no change is made to the census without understanding its effects. Under this longstanding conservative approach, inconclusive evidence of harm does not permit altering the questionnaire without further testing.

Second, the Secretary acted contrary to the evidence by concluding that a citizenship question was necessary to provide DOJ with information for VRA enforcement. The Bureau informed the Secretary that it could obtain data sufficient to address DOJ's purported needs, without adding a citizenship question,

by linking highly reliable administrative records containing citizenship status to individual census responses. The Secretary rejected that proposal in favor of a solution that purportedly would provide even more accurate citizenship information. But the Secretary never explained how using his preferred approach rather than the administrative-records approach would result in *any* improvement to VRA enforcement.

In any event, all the evidence in the Administrative Record demonstrates that the Secretary's solution—using administrative records *and* adding a citizenship question—would provide less accurate citizenship data, at greater cost, than relying on administrative records alone. The Secretary disregarded the fact that the citizenship question will *introduce* significant errors not present under the administrative-records approach: at least 9.5 million wrong responses on citizenship status; the loss of information about additional millions of noncitizens and Hispanics due to the undercount; and an inability to link an additional one million individuals to administrative records. These harms are not offset by an increase in the number of census responses on citizenship status, as petitioners claim: the Administrative Record shows that a citizenship question will often trigger *inaccurate* responses, and the Bureau expressly concluded that sophisticated modeling based on available administrative records would produce comparatively more accurate citizenship information.

Third, the Secretary failed to justify his conclusion that the purported benefit of providing DOJ more citizenship data "outweighs" any harm to the accuracy of the enumeration. The Constitution and the Census Act require the Secretary to prioritize an accurate

enumeration due to the momentous consequences of the headcount, including its effect on the allocation of House seats and billions of dollars in federal funds. The Secretary provided no explanation for his judgment to subordinate that priority in favor of generating what he asserts (counter to the evidence) would be incrementally more accurate citizenship data.

Fourth, the Secretary's stated rationale was pretextual. While he claimed to be relying on DOJ's independent judgment about the need for a citizenship question, the district court found that it was in fact the Secretary and his staff who engineered DOJ's request from the outset. The Secretary's supposed reliance on DOJ's expertise thus could not provide the necessary rationale for his decision.

C. The Secretary's decision was also contrary to law. First, given the evidence that administrative records alone would satisfy DOJ's VRA-enforcement needs, the Secretary's decision to add a citizenship question violated 13 U.S.C. § 6(c), which requires the Secretary to collect demographic information using administrative records to the maximum extent possible instead of by posing direct inquiries through the decennial census. Second, the Secretary violated 13 U.S.C. § 141(f) by adding the citizenship question without submitting the mandated report to Congress or making the required findings that new circumstances necessitated a change.

III. The Secretary's decision violated the Enumeration Clause. That provision requires the Secretary's decisions about the census to be reasonably related to the pursuit of an accurate enumeration of the total population. The Secretary flouted this

constitutional obligation by adding a citizenship question that would affirmatively undermine the accuracy of the headcount. And the Secretary's justification that the question would provide valuable information to DOJ is contradicted by the Administrative Record and the evidence produced at trial.

IV. Insofar as petitioners' challenge to extra-record discovery is not moot, this Court should reject it. The district court properly authorized discovery beyond the Administrative Record because petitioners had concededly failed to disclose the full basis for the Secretary's decision and had in fact obfuscated the Secretary's decision-making process. Discovery was therefore essential to provide the "whole record" that the APA requires.

ARGUMENT

I. GOVERNMENT RESPONDENTS HAVE STANDING.

To have standing, "a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. FEC*, 554 U.S. 724, 733 (2008). The district court correctly held that government respondents have standing here.

A. Petitioners do not challenge injury or redressability in their opening brief. The district court made extensive factual findings demonstrating that the addition of a citizenship question to the 2020 census will both cause a net differential undercount of noncitizen and Hispanic households and—separate from the undercount—will irreparably harm the accuracy of census data used by government respondents

for essential governmental functions. (Pet. App. 141a-147a, 150a-168a, 184a-187a, 233a-236a). Specifically, the district court found that adding a citizenship question will reduce noncitizen self-responses by "at least 5.8%"—or roughly 6.5 million people—and also significantly reduce self-responses from Hispanic households (Pet. App. 150a, 169a; J.A.1008). Because NRFU would not cure these differential declines, these reductions would result in a net incremental undercount of noncitizens and Hispanics. (Pet. App. 169a.)

That differential undercount and other harms to data accuracy will injure government respondents in at least four ways: (a) loss of seats in Congress and in state and local legislatures; (b) loss of federal funding; (c) harm to accurate population data used to distribute government services; and (d) forced diversion of resources. (Pet. App. 173a-194a.) Petitioners contest neither these factual findings nor the district court's legal conclusion (Pet. App. 194a-239a) that these injuries satisfy Article III.[4]

B. Instead, petitioners argue (Br. 17-21) that government respondents' injuries would not be fairly traceable to the Secretary's decision because they are more proximately caused by individuals' unlawful and irrational reactions to the addition of a citizenship question.

This argument misconceives the requirements for traceability. When a third party's actions are part of

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[4] These findings rebut petitioners' assertion (Br. 19-20) that recognizing standing here would permit challenges to "any demographic question on the decennial census." Under the district court's reasoning, plaintiffs would have standing to challenge only census questions proved to cause such harms, not any question to which some people refuse to respond.

the causal chain, all that is required is a showing that the challenged conduct had a "determinative...effect" on that third party. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Because "[p]roximate causation is not a requirement" for standing, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014), challenged conduct need not be the only step—or even "the very last step"—in the causal chain, *Bennett*, 520 U.S. at 169. Here, the district court found, and petitioners do not challenge, that the citizenship question *will* affect the census responses of noncitizens and Hispanics, leading directly to government respondents' injuries.

Petitioners are thus wrong to characterize the district court's reasoning as relying on "'speculation about the decisions of independent actors.'" Br. 18 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)). When a plaintiff has no direct evidence about how a third party will react to challenged conduct, it may be speculative to assume that the third party will react in an irrational or illegal way. But here, because respondents *proved* how noncitizens and Hispanics would react to the citizenship question (Pet. App. 228a), there is no need for judicial "guesswork as to how independent decisionmakers will exercise their judgment," *Clapper*, 568 U.S. at 413.

C. Petitioners' arguments (Br. 17-21) about the rationality or lawfulness of individuals' responses to the citizenship question are thus beside the point. The rationality or lawfulness of a third party's reaction to challenged conduct has never been a barrier to standing so long as a plaintiff can show that the third party will react "in such manner as to produce causation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

This Court and others have consistently recognized standing based on third parties' irrational or illegal responses to challenged governmental action. In *NAACP v. Alabama ex rel. Patterson*, for example, this Court found standing to challenge a law compelling disclosure of the NAACP's membership based on proof that past disclosures had caused third parties to respond irrationally—and often illegally—through "economic reprisal, [termination] of employment," and threats of physical injury. 357 U.S. 449, 462 (1958). And in *Block v. Meese*, the D.C. Circuit held that a distributor could challenge the government's classification of a film as "political propaganda" based on the anticipated, albeit irrational, public reaction to that classification. 793 F.2d 1303, 1307-09 (D.C. Cir. 1986) (Scalia, J.).

Similarly, plaintiffs have standing to challenge a defendant's failure to safeguard private information even when a data thief was "the most immediate cause of plaintiffs' injuries." *Attias v. CareFirst Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018); *Lambert v. Hartman*, 517 F.3d 433, 437-38 (6th Cir. 2008). And plaintiffs have standing to challenge a federal agency's reduction of a financial penalty when the reduction will predictably increase the likelihood that regulated entities will fail to comply with the law. *NRDC v. NHTSA*, 894 F.3d 95, 104 (2d Cir. 2018). Contrary to petitioners' attempted distinction (Br. 20), these rulings did not turn on any finding that the defendant breached a legal duty to protect the plaintiffs, but instead recognized that the third parties' irrational or illegal action was simply one step in the causal chain connecting plaintiffs' harm to defendants' conduct, *see Bennett*, 520 U.S. at 169.

D. As petitioners acknowledged below (Pet. App. 480a-481a), their position would effectively preclude anyone from having standing to challenge census decisions that reduce participation, even decisions made with the intent and predictable effect of doing so. But this Court's precedents do not support petitioners' claim that nonresponses are legally irrelevant to standing. The Court has repeatedly heard census-related cases in which the asserted harm to the plaintiff resulted from third parties' failure to respond to the census. *See Evans*, 536 U.S. at 457-58 (imputing data for people who failed to respond); *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 324 (1999) (sampling as part of NRFU). Petitioners have a constitutional and statutory duty to address such nonresponses, not to ignore them.

II. THE SECRETARY'S DECISION VIOLATED THE APA.

A. The Secretary's Decision Is Reviewable.

The district court properly rejected petitioners' argument that Congress vested the Secretary with unreviewable discretion over the decennial census questionnaire. (Pet. App. 398a-408a.) Agency action is subject to a "strong presumption" of judicial review. *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). The APA's narrow exception to this presumption for decisions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), applies only in "rare instances" where Congress has provided "clear and convincing evidence" that it vested an agency with unfettered discretion, *Citizens to Pres.*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). No such evidence exists here.[5]

1. Petitioners rely (Br. 21-22) on language in 13 U.S.C. § 141(a) mandating that the Secretary "shall... take a decennial census of population...in such form and content as he may determine." But that language merely requires the Secretary to conduct a decennial census and was not "intended to effect a new, unreviewable commitment to agency discretion." *Franklin v. Massachusetts*, 505 U.S. 788, 816 n.16 (1992) (Stevens, J., concurring in part & in judgment). Requiring an agency to exercise some discretion does not confer unfettered discretion. *See Weyerhaeuser*, 139 S. Ct. at 370.

Indeed, this Court and others have repeatedly considered challenges involving the Secretary's authority under § 141(a) to conduct the decennial census—the same authority he invokes here—and squarely rejected the argument that there are no manageable standards to apply.[6] Petitioners attempt to distinguish these cases by asserting (Br. 25) that none of them involved the census questionnaire, but that distinction finds no support in the statute. The "form and content" that § 141(a) requires the Secretary to "determine" is not the content of the questionnaire specifically, but rather the conduct of the decennial

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[5] The APA's exception to reviewability does not apply to respondents' Enumeration Clause claim. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *Webster v. Doe*, 486 U.S. 592, 601-02 (1988).

[6] *See House of Representatives*, 525 U.S. 316; *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980) (per curiam); *Utah v. Evans*, 182 F. Supp. 2d 1165 (D. Utah 2001), *aff'd*, 536 U.S. 452; *Texas v. Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992); *City of Willacoochee v. Baldrige*, 556 F. Supp. 551 (S.D. Ga. 1983).

census generally—as confirmed by § 141(a)'s inclusion of "sampling" and "special surveys" within "form and content." Just as other aspects of the Secretary's conduct of the census under § 141(a) are reviewable, so too are his decisions regarding the questionnaire.

That conclusion is consistent with other statutory language and the broader context of the 1976 Census Act, which added the quoted language to § 141(a). The 1976 Act not only continued to require the Secretary to conduct the decennial census, but more specifically confirmed his duty to pursue an accurate enumeration and expressly *constrained* his authority to use the census to gather demographic information other than the enumeration. In particular, Congress directed the Secretary to use other techniques besides the census to collect demographic information such as citizenship status. These "narrower and more specific" statutory provisions inform the Secretary's authority under § 141(a), *House of Representatives*, 525 U.S. at 338, and provide ample "law to apply," *Overton Park*, 401 U.S. at 410 (quotation marks omitted).

First, the 1976 Act, consistent with the Constitution, imposed a duty to pursue an *accurate* enumeration. The "strong constitutional interest in accuracy," *Evans*, 536 U.S. at 478, requires that Congress's census-related decisions bear a "reasonable relationship to the accomplishment of an actual enumeration of the population," *Wisconsin*, 517 U.S. at 20. Congress, in turn, built the pursuit of an accurate enumeration into the language and structure of the Census Act by requiring the Secretary to produce a "tabulation of total population" in each State "as required for the apportionment of Representatives in Congress," § 141(b). *See* 2 U.S.C. § 2a(a). "This statutory command...embodies a duty to conduct a census

that is accurate...." *Franklin*, 505 U.S. at 819-20 (Stevens, J.).

Second, the 1976 Act required the Secretary to rely on administrative records to obtain demographic data, "instead of conducting direct inquiries" on the decennial census, "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required." 13 U.S.C. § 6(c). Petitioners' contention that § 6(c) provides no judicially manageable standards (Br. 45-46) ignores the "maximum extent possible" requirement—directive language of the type that courts "routinely assess," *Weyerhaeuser*, 139 S. Ct. at 371. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004) ("best available control technology"); *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1254 (10th Cir. 1998) ("maximum extent practicable"). And the Secretary's reliance on effective VRA enforcement as the rationale for adding a citizenship question provides judicially manageable standards to evaluate whether the question is needed for that purpose and whether administrative records would produce "the kind, timeliness, quality and scope of the statistics required" for that purpose. (As explained *infra* at 43, 59-61, the Secretary's reasoning failed to satisfy those standards.)

Third, the Act provides that the Secretary may use the decennial questionnaire to collect "other" information besides a "census of population," but only "as necessary." § 141(a). Courts routinely interpret similar language as imposing judicially enforceable constraints. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("appropriate and necessary"); *National Treasury Emps. Union v. Horner*, 854 F.2d 490, 495 (D.C. Cir. 1988) ("necessary").

Congress imposed these limitations on the use of the census questionnaire based on the growing understanding that administrative records and sampling could enable the Secretary to obtain sufficiently accurate demographic data without undermining the accuracy of the enumeration. *See* H.R. Rep. 94-1719, at 10. This history demonstrates that, by adding the language of § 141(a) in the 1976 Act, Congress did not intend to grant the Secretary unreviewable discretion to collect demographic information from the decennial census without regard to whether that information is obtainable through other means.

2. The established testing procedures that have long governed the decennial census provide further standards by which to evaluate whether the Secretary's decision was arbitrary and capricious. Under applicable statutes, guidelines, and practices, pretesting is required even for minor changes to the census questionnaire to preserve the accuracy of the enumeration and other census data. See *supra* at 7-8. Petitioners miss the mark in asserting (Br. 39-40) that these requirements are not legally binding on the Secretary. Petitioners conceded below that OMB's directives, which require pretesting, *do* legally bind the Secretary. (Pet. App. 308a-309a.) In any event, courts do not look only to legally binding obligations to evaluate APA claims; to the contrary, this Court has routinely relied on an agency's "past practice," *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), or "serious reliance interests" by regulated entities, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). OMB's directives and the Bureau's Statistical Quality Standards likewise provide a basis by which to evaluate the reasonableness of the Secretary's

decision to add a citizenship question without adequate testing.

3. These statutory restrictions and established standards together create a regime far different from the one in *Webster v. Doe*, a case that arose in the distinct context of national security and that involved a single provision authorizing the CIA director to terminate an employee whenever he "shall deem such termination necessary or advisable in the interests of the United States." 486 U.S. 592, 594 (1988) (quotation marks omitted). The Census Act contains "[n]o language equivalent to 'deem...advisable,'" *Franklin*, 505 U.S. at 817 (Stevens, J.), and instead contains specific provisions constraining the Secretary's collection of demographic information.

Petitioners also misplace reliance on *Heckler v. Chaney*, arguing that the Secretary's decision involves a "complicated balancing of a number of factors" immune from judicial review. Br. 24 (quoting 470 U.S. 821, 831 (1985)). *Heckler* referred only to the "complicated balancing" of factors inherent in an agency's refusal to exercise enforcement power—authority that, unlike the conduct of the census, is traditionally reserved to the unreviewable discretion of the executive branch. 470 U.S. at 831-32. By contrast, judicial review of census-related decisions has long helped to ensure "public confidence in the integrity" of the census and to "strengthen this mainstay of our democracy." *Franklin*, 505 U.S. at 817 (Stevens, J.).

B. The Secretary's Decision Was Arbitrary and Capricious.

In deciding to add a citizenship question to the 2020 census questionnaire, the Secretary disregarded uncontroverted evidence about the question's impact on response rates, unreasonably concluded that the question was necessary to provide DOJ block-level citizenship information for VRA enforcement, and made an unexplained policy judgment that any purported benefits to DOJ were "of greater importance" than any harm to the enumeration. (Pet. App. 562a.) Each step of this process was a "classic, clear-cut APA violation[]." (Pet. App. 10a.)

1. The Secretary Disregarded Harms to the Enumeration.

a. Undisputed evidence demonstrated that a citizenship question would depress response rates.

As the Secretary recognized, it was "incumbent" upon him "to make every effort to provide a complete and accurate decennial census" given the constitutional and practical importance of an accurate enumeration. (Pet. App. 549a.) The Secretary further recognized that "[a] significantly lower response rate by non-citizens" or Hispanics "could reduce the accuracy of the decennial census." (Pet. App. 552a.)

But the Secretary then acted arbitrarily and capriciously in finding that he lacked empirical evidence that adding a citizenship question will disproportionately depress response rates of noncitizen and Hispanic households. (Pet. App. 552a-557a, 560a-561a.) That conclusion was contrary to the Administrative Record, which contains uncontroverted

empirical evidence that the question *will* disproportionately depress response rates and thus *will* "harm[] the quality of the census count" (J.A.105; *see* Pet. App. 42a-50a, 141a-144a, 285a-286a). *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Because "the only evidence in the record available...actually supports the *opposite* conclusion[]," the Secretary's decision fails to "satisfy the APA's reasoned decisionmaking requirement." *Clark County v. FAA*, 522 F.3d 437, 442 (D.C. Cir. 2008) (Kavanaugh, J.).

i. In multiple empirical analyses, the Bureau's Chief Scientist and his technical staff informed the Secretary that adding the citizenship question would depress the response rate of noncitizen households by at least 5.1 percentage points more than it would depress the response rate of citizen households. (J.A.114; *see* J.A.104-159, 292, 310.) The analyses warned that this "cautious estimate" likely did not reflect the full extent of the actual disproportionate reduction in response rates caused by a citizenship question.[7] (J.A.114-116.)

The Bureau reached this conclusion by comparing the response rates of citizens and noncitizens to the 2010 census, which did not contain a citizenship question, and the 2010 ACS, which did contain such a question. The data showed that among citizens, the drop in response rate from census to ACS was 13.8 percentage points (79.9% to 66.1%), whereas for noncitizens the drop was 18.9 points (71.5% to 52.6%)

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[7] The district court found that this differential decline was large enough to affect, among other things, legislative apportionment and federal funding. See *supra* at 21-22.

—a differential decrease of 5.1 points for noncitizens (18.9% minus 13.8%). (J.A.310.)

The Bureau attributed this disproportionate decline specifically to the citizenship question. That conclusion was confirmed by empirical analyses demonstrating that Hispanic households—which contain a higher proportion of noncitizens—were twice as likely as non-Hispanic white households to refuse to answer the citizenship question on the mail-in ACS, and nine times as likely as non-Hispanic white households to stop responding to the internet version of the ACS once they reached the citizenship question. Because these analyses demonstrated that the citizenship question specifically had a strong deterrent effect on Hispanic and noncitizen respondents, the Bureau concluded that the question rather than other factors (such as general distrust of government or the ACS's length) was driving down response rates for those populations. (J.A.109-112.)

The analyses also established that these disproportionate reductions in response rates are significant and will thus "harm the quality of the census count" (J.A.105)—i.e., reduce its accuracy (J.A.113). The analyses explained that decreasing response rates would cause more noncitizen and Hispanic households who would otherwise self-respond to enter NRFU instead. (J.A.113-114.) And because the data on these households produced by NRFU would be less accurate than these households' self-responses—in part because NRFU responses may come from a proxy, such as a landlord, rather than directly from a household member—increased NRFU at the expense of self-responses would "reduce the quality of the resulting data." (J.A.113-114; *see* Pet. App. 153a, 158a-166a.)

Finally, the Bureau emphasized that its analyses of the harms to census accuracy also applied to the Secretary's proposal to *both* add a citizenship question *and* use administrative records to generate block-level citizenship data. (J.A.159.) By contrast, using only administrative records to generate block-level citizenship data would not harm the enumeration's accuracy. (J.A.159.) The Secretary's assertion that he lacked empirical evidence about the citizenship question's effect on response rates thus runs "counter to the evidence before" him, *State Farm*, 463 U.S. at 43.

ii. The Secretary's attempts to disregard this evidence (Br. 30-31) cannot withstand scrutiny. He claimed that the analyses of the relative decline in response rates for noncitizens compared to citizens were "inconclusive" (Br. 30; *see* Pet. App. 554a), but that characterization cannot be squared with the plain language of *every* memorandum prepared by the Bureau during this time, all of which conclude—unequivocally—that the citizenship question would cause a measurable and disproportionate decline in noncitizen response rates.[8] And extensive trial evidence confirms this point: Dr. Abowd testified that the Bureau's subsequent research showed that the disproportionate decline in response rates would be worse than initially projected (J.A.854), and several other experts likewise testified that the citizenship question will disproportionately depress noncitizen and Hispanic response rates (Pet. App. 146a-148a).

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[8] Indeed, the evidence showed that the differential decline is getting worse: the disproportionate decline in noncitizen response rates in 2000 was only 3.3 percentage points, but rose to 5.1 percentage points in 2010. (J.A.110-111.)

There is no reasoned basis for the Secretary's contention (Pet. App. 553a) that comparisons of the short-form census questionnaire to the ACS or to the long-form questionnaire were too "challenging" given general differences between these instruments. The Bureau specifically controlled for such differences to produce strong empirical evidence that it was the citizenship question, rather than other aspects of the ACS or long-form questionnaire, that produced disproportionate declines in noncitizen and Hispanic response rates. (J.A.111.) The Secretary likewise misplaced reliance on the assertion that other ACS questions have overall nonresponse rates purportedly "comparable" to the citizenship question's overall nonresponse rate. *See* Br. 30. The analyses do not rest on the *overall* nonresponse rate to the ACS citizenship question but rather the *difference* in nonresponse rates between noncitizens/Hispanics and citizens/non-Hispanic whites—a difference that demonstrates that the citizenship question is causing the disproportionate depression in response rates.[9] (J.A.109-110.) The district court thus properly declined to defer to the Secretary's "conclusory and unsupported" dismissal, *McDonnell Douglas Corp. v. United States Dep't of Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004), of the very empirical evidence that he said would present a serious concern about the citizenship question's

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[9] Indeed, petitioners acknowledged that the Secretary lacked evidence that the difference in nonresponse rates for the ACS citizenship question was comparable to the difference in nonresponse rates for other questions. (PX-297, at 28-29.)

"reduc[ing] the accuracy of the decennial census" (Pet. App. 552a).[10]

Disregarding the strong evidence of the citizenship question's negative effects on census accuracy was particularly arbitrary because there is no evidence in the Administrative Record *at all* "supporting a conclusion that addition of the citizenship question will *not* harm the response rate." (Pet. App. 286a.) The Secretary purported to base his conclusion on a conversation with the Senior Vice President of data science from the Nielsen Company, who told him that the response rate to a privately operated survey had not declined when Nielsen "added questions on place of birth" and arrival in the United States. (Pet. App. 559a.) But the Administrative Record shows that Nielsen's survey was not remotely comparable to the decennial census because Nielsen, unlike the Bureau, (a) paid survey participants, and (b) had no obligation to count total population in any event. (J.A.238-240.) *See National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 842 (D.C. Cir. 2006) (Kavanaugh, J.). (rejecting agency reliance on examples that had "no bearing" on relevant issue). Moreover, despite the Secretary's assertion that "empirical evidence" from Nielsen supported his decision (Pet. App. 559a), no such evidence exists in the Administrative Record (Pet. App. 109a-112a). The Secretary also purported to rely (Pet. App. 559a) on an example shared by a former Bureau official about a

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[10] The Secretary's criticism of the Bureau's comparative analyses was also unreasonable because it was his eleventh-hour request to evaluate a citizenship question—and his failure to engage the Bureau for nearly a year beforehand—that forced the Bureau to rely on such analyses rather directly testing the question's impact on responses. See *infra* at 37-42.

prior controversial Bureau decision to share data with another agency, but that example did not involve an alteration to the decennial census (J.A.236)—and the same official informed the Secretary that "asking a citizenship question on the Decennial Census would diminish response rates and degrade the quality of responses" (J.A.235). The Secretary's conclusion is thus arbitrary because he "provided absolutely no evidence to back it up." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 605 (D.C. Cir. 2007).

b. The Secretary's reliance on a purported lack of information was unreasoned when he abandoned testing procedures.

Even if the Secretary could reasonably conclude that he lacked conclusive empirical evidence about the citizenship question's effect on response rates (Pet. App. 554a), he still acted arbitrarily and capriciously in adding the question without conducting any of the established testing procedures that are designed to provide him with precisely such empirical evidence. *See State Farm*, 463 U.S. at 52 (requiring reasoned explanation for changing course without "engaging in a search for further evidence"). The policy underlying these rigorous testing procedures is a conservative one: that a survey as large, complex, and important as the decennial census should not be altered without a firm understanding of the effects of any such change. Thus, uncertainty about the effects of changing the questionnaire is itself a compelling reason *not* to make the change. But without even a "minimal level of analysis," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), the Secretary repudiated nearly sixty years of bipartisan and scientific consensus

about the way to evaluate and achieve an accurate decennial census.

i. As the Administrative Record makes clear, and trial evidence confirms, the Secretary failed to follow the "well-proven multi-year" testing process that traditionally governs the decennial census questionnaire.[11] (J.A.204; *see* J.A.278-280, 597-600, 887-892.) These procedures are not mere technicalities. They ensure that the enumeration and other census data are as accurate as possible by evaluating whether *any* proposed change to the census questionnaire, however minor, would drive down response rates. (J.A.204-205, 626-628.) And the Bureau has consistently declined to make changes—including to the questionnaire—when testing has demonstrated reductions in response rates even less severe than the Bureau found here. See *supra* at 8 (3.4% reduction).

The Secretary ignored these procedures here, adding the citizenship question without subjecting it to any testing. (Pet. App. 100a-101a; J.A.204-205.) Moreover, the Secretary had ample opportunity to conduct at least some testing (Pet. App. 546a), and indeed was presented with the Bureau's proposal to conduct a test that would have further "isolate[d]" the effects of the citizenship question on response rates—but declined to do so (Pet. App. 554a; Trial Tr. 1001-1004). The Secretary's stark departure "from decades-

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[11] The Bureau's empirical analyses, while persuasive evidence of the likely effect of the question, were no substitute for this testing process. The analyses were done on the basis of existing data about past responses to the decennial census and other surveys. By contrast, testing involves generating new data, such as by randomized controlled trials or field testing of a specific question. *1980 Census*, *supra*, at 2-19–2-20.

long past practices and official policies" of testing without any reasoned explanation or even acknowledgment of the change was arbitrary and capricious. *American Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017); *see Encino*, 136 S. Ct. at 2125-26.

Even worse, the Secretary invoked, as part of his reason for adding the citizenship question, the purported absence of the very empirical evidence that the testing process would have produced. Courts would not defer to the Secretary of Health and Human Services if he abandoned the Food and Drug Administration's rigorous testing procedures and then approved a new drug based on a purported lack of evidence. *Cf. Troy Corp. v. Browner*, 120 F.3d 277, 293 (D.C. Cir. 1997) (arbitrary and capricious to list chemical as toxic without following testing guidelines). The district court properly declined to defer to similarly unreasoned decision-making here.

ii. Petitioners' efforts to excuse the Secretary's disregard for established testing procedures are unavailing.

First, petitioners cannot rely on an asserted "tradition" of a citizenship question (Br. 39) because there is no tradition comparable to what the Secretary seeks to do here. No questionnaire mailed to every household has *ever* included a citizenship question. Before 1960, enumerators surveyed households in person, interviewing individual respondents; and from 1960 onwards, a citizenship question appeared only on the long-form questionnaire or the ACS sent to a fraction of the population. The Secretary's addition of a citizenship question on the short-form questionnaire mailed to every household is thus unprecedented.

More fundamentally, the era when a citizenship question was sometimes asked (in person) of every resident was a time before testing procedures existed, before sampling and administrative records were shown to provide useful demographic data without harming the enumeration's accuracy, and before it was understood that questions about sensitive topics could reduce the accuracy of the enumeration. Indeed, prior censuses asked many questions that today would be rejected as likely to deter certain people from participating, including questions about slaves, Wright & Hunt, *supra*, at 154; "grown daughters who assist in the household duties," *id.* at 190; and "[i]diots," including their head size, *id.* at 200. But shortly after improved statistical methodologies became widely accepted, the Census Bureau *removed* citizenship (and many other topics) from the questions asked of every resident. And since the application of better statistical science and more robust testing procedures, Commerce and the Bureau have strongly opposed adding a citizenship question to the short-form questionnaire because it will harm the enumeration's accuracy, and because citizenship data is available from other sources. Simply stating that a citizenship question (like many others) was asked before 1960 under dramatically different circumstances thus does not come close to satisfying the Secretary's obligation to provide a reasoned explanation for reversing decades of considered agency judgment. *See Encino*, 136 S. Ct. at 2125-26; *Judulang v. Holder*, 565 U.S. 42, 61 (2011).

Second, petitioners are mistaken in asserting (Br. 39-40) that the Secretary did follow testing procedures. Notwithstanding the Secretary's assertion (Pet. App. 550a), testing a question for use on the ACS and

long-form questionnaire does not qualify it for use on the decennial census. (Pet. App. 305a-308a.) The Administrative Record—including a letter from a bipartisan group of former Bureau Directors—demonstrates that these other instruments differ in scope and kind from the short-form questionnaire mailed to every household, and that the testing done for those instruments is no substitute for the proven, multi-year testing process applicable to the decennial census questionnaire specifically. (J.A.194-196, 204-205.) Indeed, the Bureau's own Statistical Quality Standards anticipate that questions will be tested in the context of the specific survey on which they appear. (J.A.626-631.)

Moreover, even if testing for these other surveys were relevant, petitioners incorrectly assert (Br. 40) that the citizenship question "performed adequately" on those surveys (J.A.627). To the contrary, the Administrative Record demonstrates that the citizenship question has *not* performed adequately on the ACS (or the long-form questionnaire) because noncitizens "inaccurately mark 'citizen' about 30 percent of the time." (Pet. App. 555a; *see* J.A.147.) Petitioners miss the mark in relying on Dr. Abowd's statement that the Bureau "would accept" the testing performed on the ACS citizenship question. (J.A.108.) Dr. Abowd made clear that the citizenship question has *not* performed adequately on the ACS (J.A.117, 930-932), but explained that he had no better option but to rely on ACS testing, given "the quality, cost, [and] risk constraints that [the Bureau was] facing to make this decision" (Trial Tr. 1108; *see* Trial Tr. 1290-1291).

Third, the Secretary's assertion that placing "the citizenship question last on the decennial census form" would "minimize" any decrease in response rates (Pet.

App. 562a) is pure speculation, given that no evidence supports it and no testing was done to produce such evidence. (Pet. App. 288a.) The Secretary's reliance on unfounded speculation in place of evidence was thus arbitrary and capricious. *See National Lifeline Ass'n v. FCC*, 915 F.3d 19, 32 (D.C. Cir. 2019).

2. The Secretary's Reliance on DOJ's Purported Need for More Accurate Citizenship Data Was Arbitrary and Capricious.

The Secretary's sole justification for undermining the accuracy of the 2020 enumeration was that adding a citizenship question was necessary to provide DOJ the data it claimed to need for VRA enforcement. (Pet. App. 562a.) As the district court correctly concluded, this rationale was both unreasoned and contrary to the evidence.

a. The Secretary failed to explain why a citizenship question was necessary when administrative records would satisfy DOJ's request.

DOJ's December 2017 letter asked the Secretary to add a citizenship question to resolve specific concerns with existing ACS data on citizenship. In response, the Bureau informed both DOJ and the Secretary that *all* of these concerns would be addressed, without adding a citizenship question, by linking highly reliable administrative records containing citizenship information to individual census responses. The Secretary rejected this administrative-records approach (Pet. App. 554a-555a), but he failed to explain why this approach did not fully resolve DOJ's purported problems and thus provide adequate citizenship

information for VRA enforcement. That complete lack of reasoned decision-making violated both the APA and the Secretary's statutory obligation to rely on administrative records "[t]o the maximum extent possible." 13 U.S.C. § 6(c); *see State Farm*, 463 U.S. at 48 ("agency must cogently explain" decision).

In its letter, DOJ raised specific objections about the citizenship data then available. DOJ claimed that the adoption of the ACS in 2010 had deprived DOJ of the citizenship data it previously received from the long-form questionnaire "sent to approximately one in every six households." (Pet. App. 566a.) DOJ complained that, unlike citizenship data from the long-form questionnaire, ACS citizenship data was not part of the same database as other decennial-census data, was not reported at the census-block level, and did not cover the same timeframe. (Pet. App. 566a-568a).

The Bureau informed both DOJ and the Secretary that there was an available solution to all of these concerns that would not require the addition of a citizenship question. As explained *supra* at 11-12, the Bureau proposed linking individual citizenship information from the Numident database (and other administrative records) to the PL94-171 data that DOJ uses for VRA purposes and that States and their subdivisions use for redistricting. That approach would resolve all of DOJ's purported concerns with ACS citizenship data by producing "block-level tables of citizen voting age population [CVAP] by race and ethnicity" in the same database (J.A.291), at the same time, and with "essentially the same accuracy" as the decennial-census data DOJ and jurisdictions conducting redistricting already use (J.A.317; *see* J.A.107).

The Secretary never explained why a citizenship question would still be necessary given that administrative records alone would resolve DOJ's concerns. As petitioners do not dispute, the administrative-records approach will provide *direct* evidence of citizenship status for about 90% of the population—295 million people—with sophisticated modeling inferring citizenship for the remaining 10%. (J.A.146.) Petitioners now argue (Br. 33) that asking a citizenship question will somewhat improve the accuracy of the information for the 10% who cannot be linked to administrative records. But even if that were true—and it is not (see *infra* at 45-51)—neither petitioners' brief nor the Secretary's decision memorandum provides *any* explanation why such an incremental change would make any meaningful difference for VRA enforcement. In other words, despite having "staked [his] rationale" on DOJ's purported concerns with citizenship data, the Secretary provided no reasoned explanation or evidence that DOJ would still have any such concerns under the administrative-records approach. *See National Fuel*, 468 F.3d at 843.

DOJ certainly provided no such explanation or evidence. To the contrary, its letter suggests that DOJ would have been satisfied with the administrative-records approach because that approach would produce data far more accurate than the long-form questionnaire (sent to only one of six households) that the letter favorably mentions (Pet. App. 566a). And when the Bureau sought to discuss the administrative-records approach with DOJ, the Attorney General forbade any meeting. (J.A.266.) DOJ thus never made any request for data better than that supplied by the Bureau's administrative-records approach; it asked

only for data better than that supplied by the ACS, a request that the Bureau's approach fully satisfied.

Moreover, the Administrative Record demonstrates, and trial evidence confirms, that any incremental increase in citizenship-data accuracy for just 10% of the population would *not* make any meaningful difference given that ACS-derived citizenship data is already sufficient for VRA enforcement (Pet. App. 295a-297a; see *infra* at 52-53) and that the administrative-records approach would significantly improve that accuracy in any event. Neither the Secretary nor DOJ nor petitioners have identified a single VRA case that DOJ failed to bring or lost because of the absence of whatever supposed marginal improvement a citizenship question might contribute. The Secretary's decision to add a citizenship question nonetheless, for reasons divorced from any concrete connection to DOJ's stated interests, was arbitrary and capricious. *Cf. National Fuel*, 468 F.3d at 843 ("Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking.")

b. The Secretary irrationally chose an approach that would produce less accurate citizenship information than using administrative records alone.

In any event, the Secretary's conclusion that a citizenship question would produce more accurate information than the administrative-records approach (Pet. App. 556a) was directly contrary to the evidence before him. As the district court found, "all of the relevant evidence before Secretary Ross—*all* of it—

demonstrated that using administrative records" alone will "actually produce more accurate block-level CVAP data than" using both a citizenship question and administrative records. (Pet. App. 290a.)

Under the administrative-records approach, the Bureau would link 295 million census respondents (out of 330 million total) to administrative records containing citizenship information, and use sophisticated modeling to determine the citizenship of the remaining 35 million census respondents for whom administrative records cannot be linked ("unlinked respondents"). (Pet. App. 54a-55a; J.A.146.) The Bureau explained that this modeling would be very accurate. (J.A.106, 135-136, 146.)

The Secretary did not contest that, where administrative records exist, they provide extremely reliable evidence of citizenship status. (Pet. App. 554a-555a.) But he reasoned that adding a citizenship question would produce *additional* information about citizenship among the 35 million unlinked respondents, in the form of 22.2 million direct responses to the question from that group. (Pet. App. 56a, 555a-556a.) Petitioners now argue that "logic" (Br. 32) compels the conclusion that more data from census responses about this group's citizenship status is better than less. But that argument is directly contradicted by the Administrative Record, which shows that adding a citizenship question will in fact *impair* the Bureau's use of administrative records without contributing any meaningful additional information about citizenship status—thus making the net effect of using both methods less accurate than using administrative records alone. (Pet. App. 57a.)

i. This impairment derives from several factors. First, the Administrative Record makes clear that asking the citizenship question will result in *inaccurate* responses that the Bureau must accept. Survey responses to the citizenship question are "highly suspect." (Pet. App. 291a.) As the Secretary acknowledged based on responses to the ACS citizenship question (Pet. App. 560a), noncitizens inaccurately respond as citizens "at a very high rate" (J.A.120)—"often more than 30%" (J.A.117). The Bureau thus found here that a citizenship question would generate 9.5 million responses that conflict with those respondents' citizenship data in administrative records, and are likely incorrect given the high accuracy of such records. (J.A.148, 294.) And the question would generate another 500,000 responses that cannot be matched to administrative records but are also likely inaccurate given the general unreliability of survey responses on citizenship. (J.A.148, 150, 157.) Adding a citizenship question would thus "create a problem that would not exist" under the administrative-records approach. (Pet. App. 57a; *see* J.A.157.)

Petitioners attempt to minimize the significance of this error by asserting, for the first time on appeal, that "nothing prevents" the Secretary from discarding the 9.5 million citizenship-question responses that conflict with administrative records and using the records' citizenship information instead. Br. 34. But petitioners are mistaken. This newly described option was not part of the Secretary's analysis, and was not even presented to the district court, so it cannot be invoked as a post hoc rationale. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). Moreover, this modification of long-settled procedures has not itself been fully analyzed or tested. The Administrative

Record shows that the "long established" practice of the Bureau is to accept all responses given to the decennial census questionnaire, and to resort to administrative records only when no response is provided. (J.A.130.) *See Evans*, 536 U.S. at 466-67. Only this established approach has undergone testing, whereas the Bureau has not even begun "explor[ing] the possibility of checking or changing" responses to a census question (J.A.131)—a technique that might open the door to further errors or political manipulation. The accuracy of the census is too important to be governed by last-minute adjustments by appellate counsel.

Second, in addition to leading to millions of inaccurate responses, adding a citizenship question will also reduce the number of responses by causing a net undercount of noncitizen and Hispanic households, which the Bureau estimated at 6.5 million people. (Pet. App. 152a, 169a-171a.) See *supra* at 21-22. Because the enumeration will miss these people entirely, the Bureau will have *no information* about them. This undercount will thus lead not only to the loss of citizenship information for these individuals, but also to the loss of the remaining data necessary for VRA enforcement.

Third, the citizenship question will also increase by one million the total number of individuals who cannot be linked to administrative records (J.A.149-150) because the question would degrade the accuracy of personal identifying information obtained from the census, making it harder to match such information to individuals' administrative records (J.A.146-147, 158).

The Secretary's decision memorandum entirely fails to mention these "important aspect[s] of the

problem," *State Farm*, 463 U.S. at 43. Given "the lack of any coherent explanation" to address these major errors introduced by adding a citizenship question, the Secretary's determination does "not satisfy the reasoned decisionmaking requirement," *Clark County*, 522 F.3d at 443.

ii. Petitioners instead rely exclusively on the purported benefit of obtaining 22.2 million census responses on citizenship from individuals whose citizenship is not otherwise established by administrative records. Whereas reliance on administrative records alone would require modeling to determine the citizenship status of 35 million individuals for whom administrative records cannot be linked, petitioners assert (Br. 33) that it is "an obvious improvement" to obtain responses for 22.2 million of those individuals and therefore model for only 13.8 million of them. But there are several fundamental flaws in petitioners' claim.

First, the Administrative Record demonstrates that the 22.2 million responses to the citizenship question will be less accurate than the information produced by modeling. (J.A.146-148.) These responses will include both self-responses to the citizenship question, and responses derived from in-person visits and proxies. But as explained *supra* at 47, noncitizens often self-respond to a citizenship question by inaccurately claiming to be citizens—a problem that will introduce *at least* 500,000 inaccurate responses into the 22.2 million unlinked responses. (J.A.148.) And in-person visits and proxy responses will introduce additional errors beyond these incorrect self-responses, such as when proxies inaccurately describe the number or citizenship status of household members. (J.A.157-158.) By contrast, data from administrative records does not contain such errors and thus allows

highly accurate modeling for individuals whose citizenship status is not reflected in such records. (J.A.135-136, 146.)

Second, even setting aside the peculiar sensitivities of the citizenship question, petitioners are wrong to assume (Br. 33) that survey responses are "obvious[ly]" more reliable than other statistical methods. This Court has recognized that statistical estimates may produce results at least as accurate as direct survey questions. *See Evans*, 536 U.S. at 472; *cf. House of Representatives*, 525 U.S. at 348 (Scalia J., concurring in part) (Framers "must have...known that various methods of estimating unreachable people would be more accurate than assuming that all unreachable people did not exist"). Congress reached a similar judgment when, in the 1976 Act, it directed the Secretary to use sampling, rather than census questions, whenever feasible to collect data other than the enumeration. *See* 13 U.S.C. §§ 141(a), (d), 195. The traditional use of the decennial census questionnaire rather than other techniques, such as sampling and modeling, thus derives not from any inherently superior accuracy of questionnaire responses but rather from the unique requirements applicable to the actual enumeration. *See House of Representatives*, 525 U.S. at 343.

Third, the addition of a citizenship question will substantially diminish the accuracy of any modeling. As petitioners concede (Br. 34), modeling for the 13.8 million (with a citizenship question) will be worse than modeling of the 35 million (without the citizenship question) because the underlying data on which the model is based will be inherently less accurate. (J.A.148, 150; Pet. App. 291a.)

Because the "record evidence actually undermines" the Secretary's statement that more accurate citizenship data would be produced from using both a citizenship question and administrative records, the Secretary's decision to ask the question nonetheless was arbitrary and capricious. *See Clark County*, 522 F.3d at 443 n.2; *New England Coal. on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1130-31 (D.C. Cir. 1984) (Scalia, J.).

3. The Secretary Failed to Explain Why He Was Prioritizing Citizenship Data over the Enumeration.

In addition to irrationally assessing the harm to the enumeration and the benefits to citizenship data attributable to a citizenship question, the Secretary also arbitrarily concluded that providing DOJ with allegedly "more accurate" citizenship data "outweighs" and "is of greater importance than *any adverse effect* that may result" from the citizenship question (Pet. App. 562a (emphasis added)). Assuming the Secretary can choose to sacrifice the accuracy of the decennial census for some other nonconstitutional objective, he must still provide a reasoned explanation for why the benefits gained are worth the harms incurred given the constitutional, statutory, and practical importance of pursuing an accurate enumeration. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The Secretary failed to do so here.

Discretion to balance harms and benefits is not unfettered. Rather, an agency must rationally account for the relative importance that the Constitution or Congress has assigned to certain factors. Moreover, when, as here, the agency purports to act in service of some real-world benefit (improved VRA enforcement)

and is faced with credible claims of real-world harm (inaccurate enumeration), it must reasonably assess the practical effects of the balance it strikes. *See State Farm*, 463 U.S. at 55 (agency must "bear in mind that Congress intended safety to be the preeminent factor"); *Center for Biological Diversity v. EPA*, 722 F.3d 401, 414 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (agency "not permitted to substitute its view of the costs and benefits of regulation for Congress's view"). Merely identifying each side of the balance does not provide a reasoned explanation for choosing one over the other. *Cf. Michigan*, 135 S. Ct. at 2707 ("One would not say that it is even rational...to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."). The Secretary thus "need[ed] to explain" why a theoretical improvement to citizenship-data accuracy "justifies" concrete harms to the enumeration. *National Fuel*, 468 F.3d at 844.

The Secretary provided no such explanation. He made no findings whatsoever about the "broader, real-world impact" of either side of his purported balancing. *See American Wild Horse*, 873 F.3d at 931. (Pet. App. 294a-297a.) As to harm to the enumeration, the Secretary focused only on potential impacts on response rates (Pet. App. 556a) but nowhere considered the severe and irreparable consequences of even a small decrease to the distributional accuracy of the enumeration, including the loss of congressional seats and federal funding. See *supra* at 21-22.

The Secretary also made no findings about the concrete benefits of improving the accuracy of citizenship data for VRA purposes. Contrary to petitioners' assertion (Br. 30), it is not self-evident that incrementally more complete and accurate

citizenship data would have any measurable effect on DOJ's ability to enforce the VRA. See *supra* at 42-45. To the contrary, the Administrative Record shows that the absence of a citizenship question since the VRA's enactment in 1965 has not hampered DOJ's or private advocates' efforts to enforce the VRA given the availability of ACS-derived citizenship data.[12] (Pet. App. 295a-296a n.71; J.A.193-196, 397-400, 269-272; *see also* Dep. of Pamela Karlan 49-53, 66, *California*, No. 18-cv-1865, N.D. Cal. ECF:145; *id.* at 59 (no cases that plaintiffs "could bring and win if they had" citizenship data from the census "that they can't bring and win now").) Even if ACS data were not sufficient, the Secretary never explained why the improvements of the Bureau's recommended administrative-records approach would not suffice. And the Secretary also failed to address the practical impact of the Bureau's disclosure-avoidance protocols, which introduce margins of error into data shared with other agencies to protect census respondents' privacy. (Pet. App. 297a-299a.)

The Secretary thus failed to provide any explanation for why a theoretical improvement to the

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[12] The trial evidence confirms that DOJ does not need more accurate citizenship data than the ACS provides—let alone more accurate data than administrative records would provide. Dr. Lisa Handley testified that her work on VRA matters has never been impeded by using ACS-derived citizenship data, and that she is unaware of any VRA claim rejected based on shortcomings with the ACS. (J.A.797-802.) And Gore admitted that he did not know of any case questioning the adequacy of ACS citizenship data, or any changes in the law or statistical science supporting his request for a citizenship question. (J.A.1024-1025, 1079-1086, 1105-1109.)

accuracy of citizenship data "outweighs" or is "of greater importance than" the enormous practical consequences of harming the accuracy of the enumeration (Pet. App. 562a). His conclusory balancing of the harms and benefits of a citizenship question does not constitute reasoned decision-making.[13]

4. The Secretary's Rationale Was Pretextual.

a. The district court also properly found the Secretary's decision to be arbitrary and capricious because it relied on a pretextual rationale. The Secretary purported to defer to a genuine, independent request by DOJ for additional citizenship data to improve VRA enforcement. But in fact, the Secretary had already decided to add a citizenship question *before* receiving DOJ's request. And petitioners never disclosed—until this litigation—that it was the Secretary and his staff who provided the VRA-enforcement rationale to DOJ and then worked closely with DOJ to draft the December 2017 letter articulating that rationale. The Secretary's rationale for adding a citizenship question thus misrepresented that he was deferring to DOJ's expert judgment, when in fact the decision was driven by the Secretary and his staff.

Settled principles of administrative law foreclose any deference when a decision-maker falsely claims to rely on the expertise of another agency to defend its

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[13] DOJ's December 2017 letter is no substitute for such reasoning. DOJ did not conduct the balancing that the Secretary purported to do here, and in any event the Secretary cannot blindly defer to another agency's request to add a question to the decennial census. *See Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015).

determination. First, the APA requires an agency to disclose the actual rationale for its action so that the reviewing court may understand "the basis on which the [agency] exercised its expert discretion." *Burlington*, 371 U.S. at 167; *see* S. Rep. 79-752, at 15 (1945) (agency must "explain the actual basis" of its rules). As petitioners conceded below, presenting a false rationale for a decision would violate the APA. (Pet. App. 312a-313a.)

Second, a decision-maker acts arbitrarily by purporting to rely on another agency's expertise when, in fact, the decision-maker instructed that agency rather than the other way around. Such illusory reliance undercuts the foundational premise for judicial deference to administrative action: that the decision resulted from an exercise of specialized expertise that courts lack. *See State Farm*, 463 U.S. at 54. When a decision-maker purports to rely on an exercise of expert judgment that never happened, there is nothing to which the courts can defer.

The Secretary's decision to add a citizenship question transgressed both these principles. While the Secretary represented that he was responding to DOJ's December 2017 request, the Administrative Record demonstrates that the Secretary decided to add a citizenship question months before that request, as the district court explained in detail. (Pet. App. 118a-129a.) The Secretary and his staff then engaged in extensive discussions—both internally and with outside parties—that presumed the decision to add a citizenship question had already been made, and turned to how best to "execut[e]" that decision. (J.A.402.) Absent from these discussions was "any mention, *at all*, of VRA enforcement." (Pet. App. 313a.)

The Administrative Record demonstrates that the Secretary and his staff also went to "extraordinary lengths" (Pet. App. 318a) to find *any* other agency to request the citizenship question and thus provide "cover for a decision" that had already been made (Pet. App. 124a). In particular, after both DOJ and DHS initially refused to request a citizenship question (J.A.414), the Secretary personally called the Attorney General (J.A.252-253, 281-282), leading the Attorney General's Chief of Staff to assure Commerce that DOJ would "do whatever you all need us to do" (J.A.254). And after the Secretary's staff provided "DOJ with the [VRA] rationale" (Pet. App. 121a), Gore drafted DOJ's letter.

The trial evidence reinforces the district court's findings from the Administrative Record. For instance, a key member of the Secretary's staff "all but admit[ted] that Secretary Ross had made up his mind to add the citizenship question in the spring of 2017," and that his task in soliciting support from other agencies was to "'find the best rationale' to support" that predetermined result. (Pet. App. 314a.) Gore admitted that he drafted DOJ's letter solely in response to the Secretary's request and principally based on Commerce's written work product and advice, rather than any expertise of DOJ staff. (J.A.1077-1078, 1114-1115; Pet. App. 125a.) And Gore admitted not knowing whether a citizenship question would result in citizenship data more accurate than the data DOJ already uses. (J.A.1100-1103.)

The district court thus properly found that DOJ's letter reflected the Secretary's assertions about the VRA rationale rather than any independent judgment by DOJ. But courts should not defer to the Secretary of *Commerce's* judgment about VRA enforcement. *Cf.*

National Fuel, 468 F.3d at 843 (no deference to Federal Trade Commission's report that "relied largely on [Federal Energy Regulatory Commission's] assertions, not the FTC's independent examination").

b. Petitioners offer no persuasive answer to the district court's factual findings or legal reasoning. Instead, they repeatedly mischaracterize the nature of the Secretary's decision, as the district court found.

For example, petitioners argue (Br. 41-42) that the district court faulted the Secretary merely for having "additional" reasons beyond the purportedly "rational and supported" reason he gave. But the district court did no such thing; it found that the sole reason the Secretary provided—deference to DOJ's independent judgment about its VRA-enforcement needs—was neither rational nor supported because DOJ did not exercise independent judgment, and the VRA rationale was inadequate. Petitioners similarly argue (Br. 43) that the Secretary merely had an "inclin[ation] towards a certain policy position" when he "reached out to DOJ to ask if it would support that policy." But the court found that the Secretary had already decided to add the citizenship question, manufactured the VRA-enforcement rationale, provided it to DOJ to present as its own, and then made it appear as if DOJ had independently exercised judgment to request citizenship data. (Pet. App. 120a-121a.) These circumstances, along with other evidence, supported the district court's finding that the rationale given by the Secretary was pretextual.

c. There is no basis for petitioners' contention (Br. 42) that a finding of pretext requires evidence that the Secretary subjectively disbelieved the stated grounds for the decision, irreversibly prejudged the decision, or

was otherwise driven by some legally forbidden motive. Such evidence could support a finding of bad faith that renders an agency decision arbitrary and capricious. *See Woods Petroleum Corp. v. United States Dep't of Interior*, 18 F.3d 854, 859-60 (1994), *adhered to on reh'g en banc*, 47 F.3d 1032 (10th Cir. 1995). But an agency's decision is also arbitrary when it recites a false rationale, or purports to rely on a nonexistent exercise of expert judgment—for instance, if an agency were to claim that its decision was based on studies that had never been conducted.

In any event, the district court's pretext finding would be supported even if such a finding required proof that the Secretary had an unalterably closed mind or subjectively disbelieved the VRA-enforcement rationale. Ample evidence demonstrated that the Secretary had "decided to add the question for reasons entirely unrelated to VRA enforcement well before he persuaded DOJ" to send its letter. (Pet. App. 318a.) And evidence likewise demonstrated that the Secretary did not believe the VRA-enforcement rationale, such as evidence that the Secretary urged officials who lacked VRA-enforcement responsibilities to request the citizenship question. (Pet. App. 120a-121a.) The district court thus properly found that any presumption of regularity was rebutted under the exceptional facts presented here. *See United States v. Armstrong*, 517 U.S. 456, 470 (1996).

C. The Secretary's Decision Was Contrary to Law.

The district court correctly concluded that the Secretary's decision violated two statutes.

1. The Secretary violated 13 U.S.C. § 6(c) by adding a citizenship question to the decennial census even though administrative records would provide block-level citizenship data sufficient to satisfy DOJ's purported VRA-enforcement needs. Section 6(c) requires that "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of statistics required," the Secretary must "acquire and use information available" from administrative records "instead of conducting direct inquiries." The Secretary violated this statutory mandate here because, as explained *supra* at 43-45, administrative records will provide DOJ with block-level citizenship data of the "kind, timeliness, quality and scope" that it purported to need.[14]

Petitioners' contrary arguments are unavailing. First, petitioners claim (Br. 45-46) that § 6(c) leaves to the Secretary the "policy choice" to use census questions whenever he deems administrative records to be "incomplete." But that argument cannot be squared with the statute's mandatory language, which directs that the Secretary "shall" use administrative records, shall do so "instead of conducting direct inquiries," and shall do so "[t]o the maximum extent possible."

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[14] Section 6(c) thus provides a standard for reviewing the Secretary's decision (see *supra* at 28); a basis to find the decision arbitrary and capricious (see *supra* at 43-45); and a ground to find an independent statutory violation.

Congress thus left "the Secretary no room to choose." (Pet. App. 266a.)

Moreover, mere "gaps in [the] data" about citizenship from administrative records (Br. 46) cannot justify the Secretary's choice to burden the entire population with a citizenship question when administrative records will produce direct citizenship data for 295 million people and will produce highly reliable citizenship data for the remaining 35 million through modeling. (J.A.149.) Petitioners' contrary argument mistakenly presumes that § 6(c) has no application if administrative records do not *on their face* contain information. That interpretation makes little sense given the context and purpose of the 1976 amendments to the Census Act, which expressly prioritized the use of sampling and other statistical techniques to extrapolate information for the entire population based on information about a subset of the population. See *supra* at 6-7. Congress's command that the Secretary use administrative records "[t]o the maximum extent possible" "instead of conducting direct inquiries" thus cannot reasonably be read to excuse the Secretary from using statistical methods based on such records in place of the decennial census to derive information about the whole population.

Second, contrary to petitioners' assertion (Br. 46-47), the presence of a citizenship question on the long-form questionnaire before 1976 does not remotely suggest that Congress intended to exempt a citizenship question from § 6(c). In 1976, the use of administrative records, sampling, and modeling was relatively new. Congress fully expected that these methods could displace the then-current uses of the decennial census questionnaire to obtain demographic data. *See* H.R. Rep. 92-1288, at 15-16 (1972); *Mid-Decade Census*,

Hr'g Before the H. Subcomm. on Census & Statistics 7 (1967). Indeed, by 1976, the citizenship question had already been removed from the short-form questionnaire distributed to all households and placed on the long-form questionnaire—a sample survey that used modeling to generate citizenship data for the vast majority of residents. Section 6(c) merely continued a development that had already begun.

Third, there is no merit to petitioners' assertion (Br. 47) that finding a § 6(c) violation here will invalidate "*every* demographic question" on the decennial census. Whether administrative records will suffice in a given case is a fact-specific inquiry that depends on the reliability and availability of administrative records for the particular type of information required, and the ease of linking those records to census responses. Here, the district court's finding of a § 6(c) violation properly rested on the substantial and uncontroverted evidence that administrative records alone would provide highly reliable information about citizenship status specifically.

2. The district court also correctly set aside the Secretary's decision as contrary to 13 U.S.C. § 141(f). That provision precludes the Secretary from altering the census subjects that he previously reported to Congress unless he "finds new circumstances exist which necessitate" such a change and submits a new report. 13 U.S.C. § 141(f)(1), (3). The Secretary violated this provision because he failed to include citizenship as a census subject in his initial report under § 141(f)(1), and then failed to issue a new report or issue *any* findings that "new circumstances" warranted adding citizenship as a subject, as required by § 141(f)(3). (Pet. App. 274a.) The Secretary's inclusion of a citizenship *question* in his separate report of such

questions under § 141(f)(2) (Br. 52-53) did not satisfy the statute's distinct requirements to separately report census *subjects* under § 141(f)(1) and to report specific findings justifying any change in such subjects under § 141(f)(3). (Pet. App. 275a-276a.)

Petitioners are incorrect in arguing (Br. 49-51) that only Congress may enforce § 141(f). As the district court explained (Pet. App. 276a-284a), § 141(f) is unlike the purely informational reporting requirements in the cases on which petitioners rely because the provision here imposes a substantive constraint on the Secretary's ability to surprise Congress or the public by altering the subjects of the decennial census belatedly, and without making findings to justify the change.

III. THE SECRETARY'S DECISION VIOLATED THE ENUMERATION CLAUSE.

The Secretary's decision also violated the Enumeration Clause. This Court need not address this constitutional claim if it holds that the Secretary's action violates the APA. *See Califano v. Yamasaki*, 442 U.S. 682, 692 (1979). But if the Court reaches the constitutional claim, it should affirm the judgment below on this alternative ground. *See United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977).

A. The Enumeration Clause requires an "actual Enumeration" of the population every ten years that must be conducted by "counting the whole number of persons in each State." U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. While this provision leaves substantial discretion to Congress (or its delegate, the Secretary) to determine the "methodological details" of conducting the required headcount, that discretion is

constrained by the "strong constitutional interest in accuracy," *Evans*, 536 U.S. at 474, 478, with a "preference for distributive accuracy," *Wisconsin*, 517 U.S. at 20. Thus, decisions by Congress or the Secretary about the conduct of the decennial enumeration must bear "a reasonable relationship to the accomplishment of an actual enumeration of the population." *Id.*

The history and purpose of the Enumeration Clause confirm the central importance of accuracy as a limiting constitutional principle. The Framers deliberately chose the objective measure of total population as the relevant constitutional metric to avoid the use of the census for political manipulation. *Evans*, 536 U.S. at 478; *see id.* at 503 (Thomas, J., concurring & dissenting in part) (Framers' "principal concern was that the Constitution establish a standard resistant to manipulation"); *cf. Evenwel*, 136 S. Ct. at 1142 (tally of "total population" is "more reliable and less subject to manipulation and dispute than statistics concerning eligible voters"). This anti-manipulation purpose would be severely undermined if, as petitioners argued below, the Enumeration Clause would be satisfied by *any* "person-by-person headcount," however poorly planned or implemented. (S.D.N.Y. ECF:155 at 30.) Under that extreme interpretation, petitioners could conduct a census that dramatically and foreseeably undermines the enumeration's accuracy because of "bias, manipulation, fraud or similarly grave abuse," *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 675 (E.D. Pa. 1980), without transgressing any constitutional line. But such a deviation from the objective goal of an accurate headcount was "exactly the type of conduct and temptation the Framers wished to avoid." *Id.*

B. Here, the Secretary's decision to add a citizenship question to the 2020 census violated the Enumeration Clause because it would affirmatively undermine the accuracy of the enumeration. *See also California*, 2019 WL 1052434, at *2, *67-69 (finding violation of Enumeration Clause because inclusion of a citizenship question "affirmatively interferes with the actual enumeration and fulfills no reasonable government purpose"). As explained *supra* at 21-22, the evidence here demonstrates that the addition of a citizenship question would lead to a differential undercount severe enough to cause several States to lose congressional seats, among other injuries. Such loss of representation is precisely the type of injury that the Enumeration Clause was designed to prevent. *See, e.g.*, *Franklin*, 505 U.S. at 790; *Department of Commerce v. Montana*, 503 U.S. 442, 445 (1992).

The Secretary cannot defeat the constitutional claim by asserting that adding a citizenship question would provide useful data for DOJ's enforcement of the VRA. While this Court has deferred to the Secretary's judgment about how best to achieve an accurate enumeration, *see Evans*, 536 U.S. at 478, his decision here was not made to improve the accuracy of the enumeration. Instead, he decided that collecting data for VRA enforcement "is of greater importance than any adverse effect [on the enumeration] that may result" from the citizenship question.[15] (Pet. App. 562a.)

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[15] *Wisconsin*'s reference to the Secretary's "'virtually unlimited discretion,'" 517 U.S. at 19, does not hold, as petitioners suggest (Br. 21), that any census-related decision is unreviewable under the Constitution. In *Wisconsin*, the Court deferred to the

Even if it were permissible for the Secretary to trade the enumeration's accuracy for some other policy objective, the evidence here demonstrates that adding a citizenship question would not enhance VRA enforcement. As explained *supra* at 43-45, the district court found that the Bureau could provide DOJ the block-level citizenship data that it claimed to need for VRA enforcement, without adding a citizenship question, by linking highly reliable administrative records containing citizenship information to census responses. Nothing in the Administrative Record suggests that the data collected by a citizenship question would enable more effective VRA enforcement than the data collected from administrative records. Indeed, there is not even evidence that a citizenship question would be an improvement over the citizenship data currently collected by the ACS (and earlier by the long-form questionnaire). See *supra* at 52-53 & n.12. Because there is no evidence that a citizenship question would provide any meaningful improvement, the Clause bars the Secretary from relying on that justification to sacrifice the accuracy of the enumeration.

C. The district court misconstrued respondents' constitutional claim as a challenge to *any* decennial-census question "unrelated" to the Enumeration Clause's goal of conducting a headcount of all residents—including any demographic question. (Pet. App. 418a.) But the defect at issue here is not that the citizenship question is merely "unrelated" to the

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Secretary's judgment about which treatment of census data would be *most* accurate for apportionment. 517 U.S. at 20-24. It did not defer to a decision about whether to pursue accuracy at all—let alone to undermine accuracy in pursuit of some other objective.

headcount of total population, but rather that adding this question to the 2020 census would *affirmatively undermine* the accuracy of the headcount. And the proof of this harm derives from the particular circumstances of this case, not from some broad-based challenge to any demographic question. See *supra* at 21-22. *See also California v. Ross*, No. 18-cv-1865, 2018 WL 7142099, at *15 (N.D. Cal. Aug. 17, 2018) (constitutional claim arises from "the *effect* of asking a question about citizenship in the *context* of *this* decennial census taking").

For similar reasons, the district court misplaced reliance on the fact that the decennial census form has in the past included demographic questions, including questions related to citizenship. (Pet. App. 412a-419a.) The early use of demographic questions on the census, including questions about citizenship, occurred before the modernization of the census process provided a clear scientific understanding of the potential harms to the enumeration of asking particular questions. See *supra* at 3-4. Accordingly, for those prior forms, there is no indication that the Secretary had before him concrete and unrebutted evidence that the inclusion of a particular demographic question would lead to a materially less accurate headcount, as is the case here.

D. Petitioners asserted below that respondents' Enumeration Clause claim was a nonjusticiable political question. The district court correctly rejected that argument. (Pet. App. 391a-398a.)

Under the political question doctrine, courts may not adjudicate a constitutional dispute where there is "a lack of judicially discoverable and manageable standards for resolving it," or where there is "a textually demonstrable constitutional commitment of the

issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Here, the constitutional interest in accuracy provides a judicially manageable standard to evaluate the Secretary's decision to add a citizenship question. See *supra* at 62-63. And contrary to petitioners' arguments below, the Constitution does not commit the conduct of the census entirely to the unreviewable discretion of either Congress or the Secretary.

The Enumeration Clause provides that the decennial census shall be conducted "in such Manner as [Congress] shall by Law direct." Art. I, § 2, cl. 3. The district court correctly observed that this Court and others have never found this language to completely insulate the Secretary's conduct of the census from judicial review. (Pet. App. 392a-393a.) Indeed, petitioners concede (Br. 27) that the Secretary's decisions concerning the census are not entirely unreviewable. In particular, petitioners acknowledged below that courts may review whether the Secretary is in fact conducting a "person-by-person headcount of the population" but contended that courts are powerless to evaluate "the manner" by which the Secretary conducts such a headcount. (S.D.N.Y. ECF:155 at 21.)

Petitioners' dichotomy is "a false one." (Pet. App. 395a.) The core error in petitioners' argument below is that the "manner" of conducting the decennial census can and does have consequences for whether the Secretary is in fact conducting a "person-by-person headcount of the population." That connection lies at the heart of both respondents' Enumeration Clause and APA claims: respondents alleged, and proved at trial, that a citizenship inquiry would make the person-by-person enumeration *less* accurate.

Petitioners' attempt to label respondents' constitutional claim as a challenge to the "manner" of conducting the decennial census thus does not distinguish this case from the challenges that are indisputably justiciable under the Enumeration Clause.

IV. THE DISTRICT COURT PROPERLY AUTHORIZED DISCOVERY.

The entry of final judgment has largely mooted the parties' discovery dispute. *See* No. 18-557 Gov't Resp. Br. 26-28. The district court vacated its order authorizing the Secretary's deposition (Pet. App. 352a-353a), and respondents withdrew that deposition request (S.D.N.Y. ECF:577). And because the Administrative Record alone supports the district court's judgment (Pet. App. 260a-261a), this Court may affirm without resolving whether extra-record discovery was warranted.

If the Court reaches the question, it should affirm the district court's discovery orders. Petitioners misconstrue (Br. 55) the basis for discovery as an attempt to "probe the Secretary's mental processes." But discovery was justified to uncover objective facts about the decision-making process that should have been disclosed as part of the "whole record" that the APA requires. 5 U.S.C. § 706; *see* 18-557 Gov't Resp. Br. 30-39. As the district court explained (Pet. App. 126a-129a), petitioners obscured their decision-making, depriving respondents—and the courts—of the information that the Secretary "directly or indirectly" considered. *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). On July 3, when the first discovery order was entered, petitioners had concededly failed to disclose the Secretary's deliberations before December 2017; the

Secretary had provided contradictory accounts of those deliberations; and there was evidence that the Secretary had prejudged the decision to add a citizenship question and used the VRA-enforcement rationale as a pretext. See *supra* at 55-56; 18-557 Gov't Resp. Br. 40-48. Given this "strong showing of bad faith or improper behavior," *Overton Park*, 401 U.S. at 420, extra-record discovery was warranted to understand "the basis on which the" Secretary reached his decision. *Burlington*, 371 U.S. at 167.

CONCLUSION

For each of these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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